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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 494

PETE ANTHONY, ET AL.,

Appellants,

vs.

JOHN C. VEATCH, COLUMBIA RIVER FISHERMEN'S PROTECTIVE UNION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

STATEMENT OF COLUMBIA RIVER FISHERMEN'S PROTECTIVE UNION, ET AL., OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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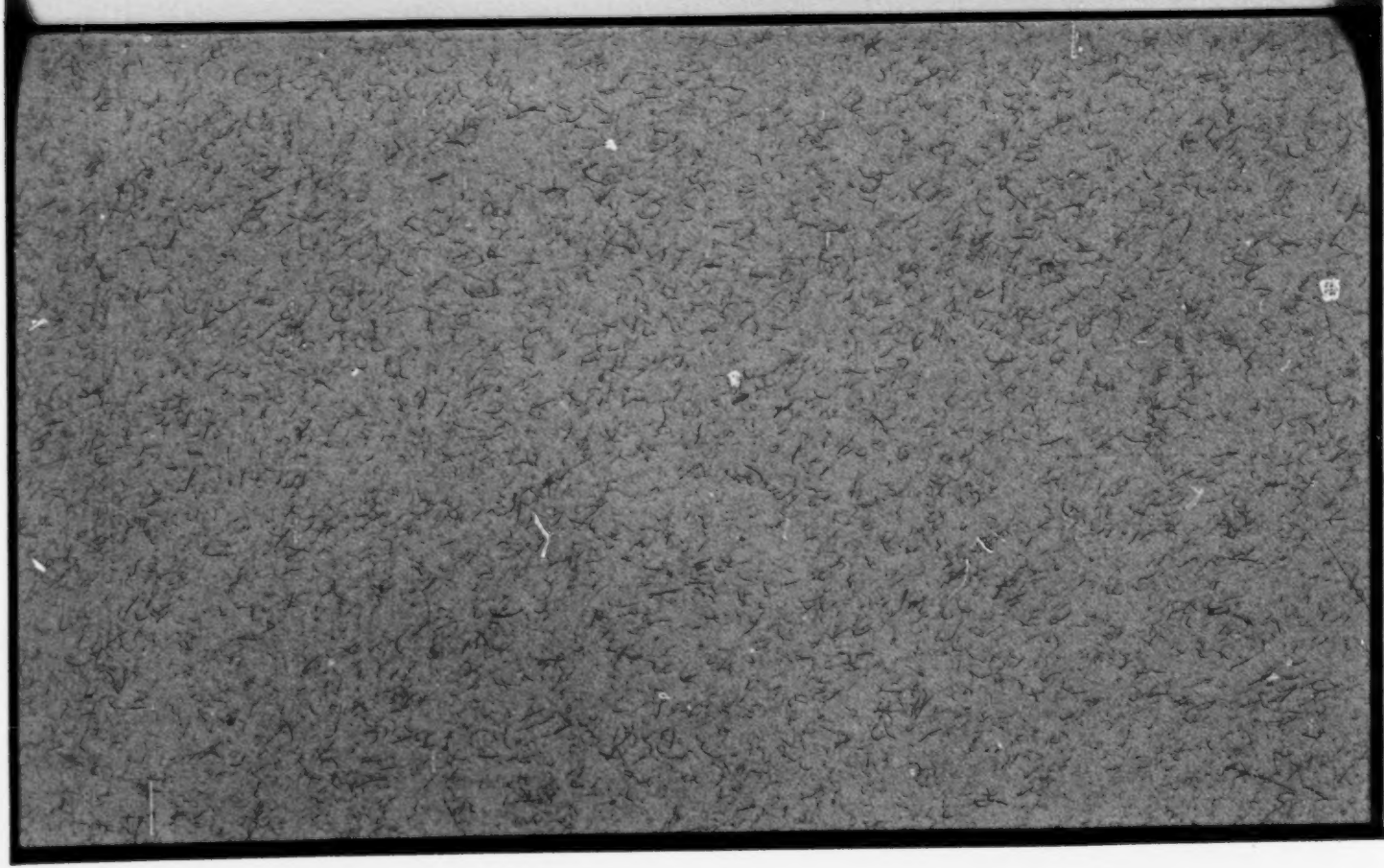

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SUPREME COURT OF THE STATE OF OREGON

PETE ANTHONY, ET AL.,

Plaintiffs,

vs.

JOHN C. VEATCH, ET AL.,

Defendants,

AND

COLUMBIA RIVER FISHERMEN'S PROTECTIVE UNION, A CORPORATION, ET AL.,

Defendant-Intervenors

DEFENDANT-INTERVENOR-APPELLEES' STATEMENT OPPOSING APPELLANTS' STATEMENT OF JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

The Defendant-Intervenor-Appellees in the above entitled cause, hereinafter referred to as Intervenors, respectfully submit their statement in opposition to appellants' statement of jurisdiction, in compliance with Rule 12 of the Rules of the Supreme Court of the United States, and in support of Intervenors' motion herein, to dismiss or affirm, and say as follows:

I. Statement of Issues on Appeal

Appellants assert that a 1949 law of the State of Oregon which prohibits the taking of salmon in the Columbia River by fish traps is violative of the 14th Amendment of the Constitution of the United States on the following grounds:

1. It deprives appellants of their property without due process of the law and constitutes an unreasonable exercise of police power;

2. It grants a virtual monopoly of commercial fishing to gill-net gear fishermen;

3. It denies appellants equal protection of the laws in that it exempts "fishing by Indians under Federal regulations."

These issues, among many others, were carefully considered by the Supreme Court of the State of Oregon in light of the Constitutions of the United States and the State of Oregon, having similar provisions, and the issues were decided in favor of the constitutionality of the law in an opinion, *Anthony, et al.* v. *Veatch, et al.*, filed on June 30, 1950, and appearing in 50 Advance Sheets, Oregon Supreme Court, page 1007.

It is interesting to note that the same three issues set out above were first raised in trial court, and that the court examined evidence pertaining to the reasonableness of the legislation, and held the law to be constitutional except for parts which the court upon its own volition considered defective in draftsmanship. The State Supreme Court then reexamined the evidence *de novo* and affirmed the constitutionality upon the grounds of reasonableness, and reversed the trial court's opinion as to defective draftsmanship, and construed the statute to be completely constitutional.

The importance of this will appear subsequently in this statement wherein Intervenors contend no substantial Federal question is raised by the attempted appeal, particularly in that the United States Supreme Court is more than persuasively bound by the State Supreme Court's construction of state statutes and findings of fact.

II. The Attempted Appeal Is Not Timely

Appellants' Statement of Jurisdiction offers to show that the Oregon Supreme Court's mandate was filed with the trial court on the 14th day of September, 1950, and that a petition for appeal was presented to the Oregon Supreme Court on the 25th day of November, 1950. This is insufficient to show jurisdiction as required by Rule 12, in lieu of the fact that the record discloses that the opinion of the Supreme Court of the State of Oregon, filed June 30, 1950, remanded the cause "for further proceedings not inconsistent with this opinion"; and that said further proceedings left nothing to be done except the ministerial act of entering judgment, the rights of the litigants having been fully determined.

The appellants by virtue of 28 U.S.C.A. 2101 (c) had ninety days to prosecute appeal, and are bound by the holding of *Cole* v. *Violette,* 319 U.S. 581, 87 L. Ed. 1599, to wit: "The date of the rescript of a state court of last resort prescribing the decree to be entered by the court below, and not the date of such entry, marks the beginning of the period within which leave to appeal to the Supreme Court of the United States must be sought, even though State practice regards the decree entered by the lower court on the prescript rather than the order of the higher court contained in the rescript as the final decree in the case."

III. No Substantial Federal Question Is Raised by the Appeal

There has been very little conflict among the litigants as to the statements of law bearing upon this case, as, for instance, it was never disputed that a State in the exercise of its police power must meet the test of reasonableness.

Arguments were based chiefly upon issues of fact bearing upon statutory construction and reasonableness.

It is well settled that the Supreme Court of the United States is bound by the construction given to a State statute by the highest court of the State as though the meaning so fixed had been expressed in the statute in specific words (*Guaranty Trust Company of New York* v. *Blodgett*, 287 U. S. 513, 77 L. Ed. 463); and that facts found by the lower court and adopted by the highest court of a State, when supported by competent testimony, will not ordinarily be reexamined in the Federal Supreme Court (*Portland RR., Light & Power Co.* v. *Railroad Commission of Oregon*, 229 U. S. 398, 57 L. Ed. 1248).

The three issues priorly stated will now be examined in sequence:

1. Reasonableness

Applicable parts of the XIVth Amendment of the Constitution of the United States provide . . . "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The State of Washington in 1935 outlawed the use of fish traps on the Washington side of the Columbia River (Chapter 1, laws 1935), and the trappers at that time also carried their fight to the State Supreme Court on the grounds of reasonableness, monopoly and Indians; and the law was upheld in the Case of *State ex rel. Campbell* v. *Case et al.*, 47 Pacific 2nd 24.

The Oregon Supreme Court arrived at the same conclusion *independently*. The Supreme Courts of both states relied upon cases of the Supreme Court of the United States (notably *Greer* v. *Connecticut*, 161 U. S. 519, 40 L. ed. 793) in holding that the regulation of the manner of taking fish and game was a proper exercise of police power.

The Oregon Supreme Court further relied upon the cases of *Thomsan* v. *Dana*, 52 F. 2d 759; *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385; *Smith* v. *Maryland*, 18 How. (U. S.) 71, 15 L. ed. 269; and *Union Fishermen's Co.* v. *Shoemaker*, 98 Ore. 659, which in turn was based on Federal decisions. We also call the Court's attention to *Manchester* v. *Massachusetts*, 139 U. S. 240, 35 L. ed. 159, cited in some of the above cases. All of these cases support the position that the abolition of one type of fishing gear is a proper exercise of the police power of the state. Thus, the state courts have followed the decisions amply ruled upon by the Supreme Court of the United States.

Citing the law of the above cases, and summarizing the evidence, the Supreme Court of the State of Oregon in the case at bar held:

"We have said that the preservation of fish and game is within the proper scope of the police power; that while the legislature is not the final judge of the limitations of that power, and legislative action in that regard must be limited to such as is reasonably necessary for the public benefit, yet it is the legislative function primarily to determine the necessity or expediency of measures adopted; and that, when the courts are called upon to apply the judicial test of reasonableness, they will accord to the legislative authority, whether legislature or people, a large discretion in determining, not only what the public interest requires, but also what measures are necessary for the protection of such interests, the presumption being in favor of the reasonableness and validity of the regulation. See *Union Fishermen's Co.* v. *Shoemaker, supra* (98 Ore. 659, 193 P. 476, 194 P. 854). In our opinion, the evidence does not conclusively show that the act fails to meet the test of reasonableness, and we think that the presumption in favor thereof should prevail."

The evidence, as appellants point out in their Statement of Jurisdiction, consists of a couple of Oregon Fish Commission Pamphlets, as interpreted by scientific opinion; said opinion, as appellants' transcript of record shows, being the opinion of biologist Donald R. Johnson, who in appellants' record of transcript of testimony, testified on redirect, pages 33, 34:

> "Q. These matters to which Mr. Anderson has called your attention, these other factors—pollution at the dam and the like—would consideration of any of these factors cause you to change your opinion as voiced on traps?
>
> A. No, but I think that it was a fair question, but remember that it is my honest opinion that biologists should have data if they are going to stand on good ground. *My opinion wouldn't make any difference.*
>
> Q. Is there any available data?
>
> A. Not that you can nail down. There is some data but not what you can nail down." (Emphasis supplied.)

The Supreme Court of the State of Oregon manifestly did not err in applying the well founded law to its conclusion of fact upon the veneer of evidence in this case.

2. Monopoly

It is necessary to point out that the question of monopoly in relation to the 14th Amendment is now raised by appellants for the first time in this attempted appeal. In the state courts the monopoly question was raised in relation to the Oregon Constitution *only* (Art. I, Sec. 14), which corresponds to the equality clause of the 14th Amendment. However, this is distinguished from the question of reasonableness and the question of Indians which were raised in the state courts in relation to *both* the State and Federal Constitutions. In other words, appellants are raising the issue of monopoly as a Federal question now for the first

time. As such, it is not reviewable. *Keyes* v. *Madsen*, 179 F. 2d 49; *Wabash Ry. Co.* v. *City of St. Louis*, 64 F. 2d 921 290 U. S. 668, 78 L. ed. 577.

In any event it is well settled as a matter of local and Federal law that the abolition of one type of fishing gear, once meeting the test of reasonableness, and applying to all persons equally, does not create a monopoly in contravention of the equality clause of the 14th Amendment. Any other holding would deprive the state of the power to regulate the *method* by which fish could be taken. The prohibition of dynamiting of fish, of course, has the effect of giving a "monopoly" to all persons who choose not to dynamite fish. There is no monopoly because all persons may use legal gear in their fishing operations. If, as appellants allege, current users of legal gear, attempt in any instance to prevent any other persons from using legal gear, the remedy of trespass, or injunction, is adequate under present laws.

The Oregon Supreme Court in the case at bar cited *Campbell* v. *Case*, supra; *Thomsan* v. *Dana*, supra; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; *Harper* v. *Galloway*, 58 Fla. 255, 51 So. 226, and numerous other state decisions which in turn cite Federal decisions having similar factual situations and holding the same law.

In this regard, the Oregon Supreme Court in the case at bar said: "In our opinion, the state, under its police power, in order to prevent the extermination of food fish and bring about their increase, may lawfully prescribe the methods by which they may be taken. (Citing cases.) The act under consideration applies equally to all persons; that is to say, all persons are forbidden to use fixed gear in fishing for salmon in the Columbia River." (Citing cases.)

The prohibitive measure in question was sponsored by initiative procedure, as appellants point out, and received the

greatest majority vote of all the initiative measures on the ballot. The measure was then met by powerful lobbies in the 1949 State Legislature, and the assembly refused to appeal the law. Appellants then argued lengthily in the state courts that being the gill-netters sponsored the initiative measure (not mentioning the support it had from the sports-fishermen, the Izaac Walton League, and other groups; and not mentioning that that the initiative was opposed in advertising by the greater financial interests of the canneries and trappers and seiners) that the law should be declared unconstitutional on the grounds that the gill-netters conducted a misleading campaign. The Oregon Supreme Court decided otherwise, and now the appellants improperly resort to the same innuendoes and aspersions in their Statement of Jurisdiction.

Intervenors will not here dignify these declamations by argument, other than to point out that the Oregon Supreme Court in the case at bar noted that appellants did not come into court with clean hands; that an initiative measure must be treated in the same way as any legislative measure as a matter of local law; and to point out that appellants continued to fish for two years under injunction in the Columbia River while also fishing in this sea of litigation, up until September, 1950, when the injunction was dissolved; and to point out that the price raise on the fish market as alleged for the first time in appellants Statement of Jurisdiction was not caused by any price conspiracy, as appellants indicate, but was the ordinary and natural price rise occasioned by the decline of the salmon run near the end of fishing season, and was determined solely by the laws of supply and demand. Appellants' attack is certainly unwarranted, particularly at this stage of pleading.

3. Indians

Appellants exhibit singular effrontery in again bringing up the constuction of the 1855 Treaties of the Middle Tribes of Oregon which the Supreme Court of the United States have passed upon many times, inciuding a case in which one of the appellants, Seufert Bros. Co., was involved (*United States of America* v. *Seufert Brothers Company*, 249 U. S. 194, 63 L. ed. 555; also, *Seufert* v. *Olney*, 193 F. 200.)

> "Section 6. The provisions of this Act do not apply to fishing by Indians under Federal regulations, or the use of any device or means by the State or National Government in catching fish for propagation, or scientific purposes."

Appellants urged in the state courts that this provision would give Indians a right to fish superior to the rights of anyone else in Oregon, albeit the Seufert cases noted above HELD that the treaties gave the Indians no rights other than to guarantee them the right to fish in common with any and all other citizens.

Now on attempted appeal appellants urge that the treaties are not binding upon the State of Oregon because although they were signed prior to Oregon's admission as a State, they were not ratified by the United States Senate until after Oregon's admission; this is now urged, although the above cited cases were founded on the premise that the states were bound, and the cases cited therein were so founded.

As a matter of logic, appellants contention would not help them even if their contention were correct, because if the state happened not to be bound by the treaties (Federal Regulations), and the treaties could not apply to the rights of Indians in Oregon, then the Indians could not possibly

have any rights superior to those of any other citizen. Therefore, the question is moot.

The Supreme Court of the State of Oregon passed upon the question, however, citing the above cases, and citing other Federal cases which have settled the question of rights under the Indian treaties and their binding effects, to wit: *United States* v. *Winans,* 198 U. S. 371, 49 L. Ed. 1089; *Tulee* v. *State of Washington,* 315 U. S. 681, 86 L. Ed. 1115.

Citing the *U. S.* v. *Winans* case, *supra,* the Oregon Supreme Court in the case at bar pointed out: "It was held that the treaty was not a grant of rights by the government to the Indians, but rather a grant of rights by the Indians to the government, with a reservation of those rights not granted. Those rights reserved included an exclusive right of fishing within the boundaries of the Indian reservation, and a right of fishing, outside the reservation, in common with the citizens of the territory.

"Until 1871, Indian tribes were recognized by the United States as possessing the attributes of nations to the extent, at least, that the federal government entered into treaties with them. 27 Am. Jur., Indians, Sec. 9. A treaty with an Indian nation is given the same force and effect as one with a foreign nation. It becomes a part of the law of the land, and cannot be annulled either in effect or in operation by courts or by state legislatures. Idem., Sec. 10. Such a treaty, as between the high contracting parties, takes effect, in the absence of any provision to the contrary, from the time it is signed, and its subsequent ratification relates back to that date. 63 C. J., Treaties, Sec. 21. Plaintiffs argue that, although the Indian treaties involved in this case were entered into prior to the admission of Oregon into the Union, yet, because they were not ratified by the senate until after the admission of Oregon into the Union, they

are not * binding upon Oregon. However, as the treaties are as a part of the law of the land, this argument cannot be sustained."

Intervenors submit that the high State Court could have come to no other conclusion in lieu of the well settled Federal law; and that in any event, it would be of no aid to appellants if, on the other hand, it were found that Indians in Oregon had no rights secured by treaty.

WHEREFORE, Intervenors move hereby that the cause herein be dismissed or affirmed by the Supreme Court of the United States.

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* The word 'not,' appearing in the original typewritten opinions, was inadvertently left out of the Advance Sheets.

APPENDIX

Intervening Defendants' Testimony

Henry Niemala was thereupon called as a witness on behalf of the Intervening defendants, and, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Anderson:

Q. Your name is Henry Niemala?
A. Correct.
Q. You were sworn to testify before?
A. Yes.
Q. What is your occupation?
A. Executive secretary of the Columbia River Fishermen's Protective Union.
Q. With what other organizations is the Columbia River Fishermen's Protective Union affiliated?
A. Through the C. I. O.; through the Inter-Allied Workers of America.
Q. You are a part of the International Fishermen's Allied Workers?
A. Yes, sir.
Q. When was the—strike that, please. Ordinarily, you call your union the C. R. P. F. U., do you?
A. C. R. F. P. U.
Q. When was it first organized?
A. I am not just exactly sure, but I think it was 1887; somewhere within ten years of that date.
Q. And has it been in continuous existence ever since that time?
A. More or less.
Q. With headquarters in Astoria?
A. Correct.
Q. Of what is the membership comprised?
A. Columbia River gill-net fishermen and fish processing workers in the plants around the Columbia River. By processing plants I mean fish houses, cold storages, and canneries.

Q. What is the limitation of the organization's jurisdiction?

A. Within the Columbia River.

Q. And commercial fishing is carried on in what part of the Columbia River?

A. From the mouth of the Columbia River as far as Celilo Falls; however, we do not solicit membership beyond Bonneville Dam.

Q. Do you engage in, as an union—Does C.R.F.P.U. engage in collective bargaining for its members?

A. Yes.

Q. Do you know approximately how many members you have in the organization?

A. In a recent check-up we found that we had, as of January 1, 1949, for the paid membership.

Q. Is that the entire group or is it only gill-netters?

A. Only gill-netters; fishermen who are licensed either as boat puller or gill-net boat operator.

Q. Four hundred sixty——

A. (Interrupting) 465, I believe. The court has the list.

Q. Ordinarily does one man operate a gill-net?

A. During the greater part of the year; however, during August there are quite a few who hire another man, who is called a boat-puller. During the earlier part of the year there are very few who operate with two men.

Q. The boat-puller would not be the holder of a gill-net license?

A. He would not.

Q. Do you know how many members you have that hold gill-netters' licenses?

A. I wouldn't be able to determine the exact number because we do not divide them or have any record showing which is a boat-puller or which is a gill-net boat operator.

Q. Can you give us, from you own memory, approximately how many of your members hold a gill-net license?

A. Of the fishermen, I imagine 80 percent or something like that.

Q. That is all.

Cross-examination.

By Mr. Ryan:

Q. This list you supplied to us does not include any members that had not paid their dues, does it?

A. The list of January 1, 1949, was the paid-up membership for the year 1948. We did submit another list that showed membership of 188, I believe, that was paid up as of about July 1, 1949.

Q. Does that list include—Did everybody in the union pay their dues?

A. No, that was the ones paid during the year 1948.

Q. There may have been some other members who were not on the list who are delinquent in their dues?

A. There are some that have paid dues to the organization since that time for last year.

Q. That is all.

Mr. Quesseth: No questions.

Mr. Anderson: Is that the number of members of this union who would be classed either as boat-pullers or gill-net boat operators, the 465 plus 188?

A. I am not sure what exact figures. The court has the same list I have referred to.

Mr. Anderson: That is all.

(Witness excused.)

Mr. Ryan: If the court please, we were submitted a list first and then Mr. Niemala promised to send a list to us. We do not have the first list. It is in our office, and I think for the purpose of comparison we should have the first list.

Mr. Anderson: I will give you a copy, if the court please.

(Handed to counsel.)

Mr. Ryan: Any objection to using this in evidence?

Mr. Anderson: No.

The Court: Admitted.

(Said list marked and received in evidence as Plaintiffs' Exhibit 9.)

RUSSELL RUSTOW was thereupon called as a witness on behalf of the Intervening Defendants, and, having been first duly sworn was examined and testified as follows:

Direct examination

By Mr. Anderson:

Q. State your name please.
A. Russell Rustow.
Q. Where do you live?
A. Wauna, Oregon.
Q. What is your occupation?
A. Commercial fisherman.
Q. Do you belong——
A. (Interrupting) The Columbia River Union at the present time.
Q. Are you familiar with the commercial fishing that was carried on in the Columbia River for the past ten years?
A. I am.
Q. And are you familiar with the operations on the river at the present time?
A. I am.
Q. Tell us whether any traps are presently located at the mouth or in the streams flowing into the Columbia River?
A. There is one trap on Wallace Slough which joins in the Clatskanie.
Q. Is that part of the spawning grounds for salmon?
A. It is.
Q. What is the purpose of placing it in such a position?
A. To catch fish.
Q. Are you more apt to catch fish at that location than at other locations?
A. In that general location, yes.
Q. Why?
A. It is the natural lead for them.
Q. The fish leading into what?
A. It is a narrow channel and natural lead.
Q. That would be fish leading into the Clatskanie?
A. Not necessarily Clatskanie, but through the Clatskanie to other streams.
Q. That is all.

Cross-examination.

By Mr. Ryan:

Q. Where is this location?
A. On the Wallace Slough.
Q. What was the purpose of putting a trap there?
A. To catch fish.
Q. That is all.
Mr. Quesseth: No questions.

Cross-examination.

By Mr. Ryan:

Q. Was there some gill-netting going on where this trap was?
A. There might be a slight amount, but it would be almost impossible to gill-net where that trap is there.
Q. Isn't it true that the gill-netters' union protested the location of that trap at one time?
A. I believe they protested one location, but I don't believe it is the same location as now.
Q. Did they make them move the location?
A. It has been moved several times.
Q. Because of protests?
A. Not necessarily so. I believe on account of putting in a better fishing position.
Q. That is all.
Mr. Anderson: Nothing further, Your Honor.

(Witness excused.)

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[redacted]

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In the Supreme Court

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No.

PETE ANTHONY, et al.,

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JOHN C. VEATCH, et al.,

Respondents,

and

COLUMBIA RIVER FISHERMEN'S PROTECTIVE UNION, a corporation, et al.,

Respondents-Intervenors.

APPELLANTS' BRIEF IN REPLY TO RESPONDENTS' AND RESPONDENTS-INTERVENORS' STATEMENTS IN OPPOSITION OF JURISDICTION AND MOTIONS TO DISMISS OR AFFIRM

Appellants herewith respectfully submit their reply to the Respondents' and Respondents-Intervenors' Statements in Opposition to Appellants' Statement of Jurisdiction and Motions to Dismiss or Affirm.

For the sake of brevity, Appellants direct this reply to both Respondents and Respondents-Intervenors.

Respondents-Intervenors assert on page 2 of Intervenors' Statement and Motion that the Appellants' appeal was not timely. This is the only point raised by either Respondents or Respondents-Intervenors that is not clearly answered in Appellants' Statement of Jurisdiction heretofore filed in the Court below by Appellants in compliance with rule 12 of the Supreme Court of the United States, as amended. In order to clarify this point, which might be confused by Respondents-Intervenors' statement, we submit the following as a sufficient answer thereto.

The order allowing appeal was signed by the Chief Justice of the Supreme Court of the State of Oregon on November 25th, 1950, and filed within ninety days of the decision on rehearing pending before said court, which decision was rendered on August 29th, 1950. That a petition for rehearing suspends the time for filing an appeal to the United States Supreme Court is well established. See *Gypsy Oil Co. vs. Escoe*, 275 U.S. 498; *United States vs. Seminole Nation*, 299 U.S. 417.

Respectfully submitted.

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